

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER98-1438-020
and EC98-24-012

ORDER ADDRESSING COURT OF APPEALS DECISION TO VACATE
COMMISSION ORDER

(Issued June 2, 2004)

1. This case is before the Commission as the result of the United States Court of Appeals for the District of Columbia (D.C. Circuit Court)¹ vacating the Commission's decision that, among other things, accepted a compliance filing that revised the definition of "Wholesale Distribution Service" in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) Open Access Transmission Tariff (OATT).²

2. As discussed below, the Commission will require that Midwest ISO revise its OATT to clarify that unbundled retail customers that seek to take local distribution service cannot be eligible customers under the Midwest ISO OATT with respect to that service.

Underlying Commission Orders

3. In compliance with Order No. 888,³ Midwest ISO filed its OATT that adopted the pro forma tariff's definition of "Eligible Customer," which includes "any retail customer

¹ Detroit Edison Company v. FERC, 334 F.3d 48 (D.C. Cir. 2003).

² See Midwest Independent Transmission System Operator, Inc., 84 FERC ¶ 61,231 (1998) (September 16 Order), order on compliance filing, Midwest Independent Transmission System Operator, Inc., 87 FERC ¶ 61,085 (1999) (April 16 Order).

³ See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order (continued...)

taking unbundled Transmission Service pursuant to a state retail access program or pursuant to a voluntary offer of unbundled retail transmission service by the Transmission Provider.”⁴

4. In the September 16 Order, the Commission conditionally accepted Midwest ISO’s OATT. Midwest ISO was directed to modify its OATT to, among other things, specify how wholesale transmission customers would obtain wholesale distribution services when a local distribution facility is involved.⁵ The Commission also reiterated that “local distribution services for retail transmission customers will be subject to the jurisdiction of the state commission.”⁶

5. To comply with the September 16 Order, Midwest ISO revised its OATT to include a definition of wholesale distribution service, and a schedule which contained the information required by the Commission's order and which provided that transaction-specific information, including the rates and charges, would be stated in the service agreement.

6. Detroit Edison Company (Detroit Edison) intervened in the compliance proceeding and protested the filing. Detroit Edison argued that Midwest ISO’s tariff should be further revised to make clear that distribution service under the tariff is limited to wholesale customers and is not available to retail customers. Otherwise, Detroit Edison asserted, retail customers might attempt to circumvent state-jurisdictional local distribution tariffs.

7. In the April 16 Order, the Commission disagreed with Detroit Edison's contention. It held that requiring Midwest ISO to revise its tariff to provide for FERC-jurisdictional transmission service over the FERC-jurisdictional distribution facilities of a Midwest ISO Participant did not change the customers that would be eligible to use such facilities, as defined in the ISO Tariff.⁷ The Commission pointed out that section 1.11 of the pro forma tariff makes clear that any electric utility, Federal power marketing agency, or any

No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

⁴ Order No. 888 at 31,931.

⁵ See September 16 Order at 62,172.

⁶ Id.

⁷ See April 16 Order at 61,364 (citing ISO Tariff, section 1.11 (Eligible Customer)).

person generating electric energy for sale for resale is an eligible customer and "[a]ny retail customer taking unbundled transmission service pursuant to a state requirement that a Transmission Owner offer the transmission service, or pursuant to a voluntary offer of such service by a Transmission Owner, is an Eligible Customer under the Tariff." The Commission concluded that: "[o]ther retail customers are not eligible to take any service, including wholesale distribution service, under the ISO Tariff."⁸

8. Detroit Edison also expressed concern that certain facilities could be treated as distribution facilities to justify a distribution charge and as transmission facilities for purposes of the formula rates, thus allowing for double recovery. Thus, Detroit Edison requested that, in order to prevent the possibility of customers being double charged for the same facilities under both the transmission rate and the charge for distribution service, the Commission direct the Midwest ISO Participants to separate transmission and distribution facilities and their respective costs before filing transmission charges under the formula rates.

9. The Commission denied Detroit Edison's request. The Commission pointed out that all aspects of the transmission rate formula had been set for hearing, including the question of whether any member has included in the rolled-in transmission rate costs that should be directly assigned to customers taking wholesale distribution service.⁹ Furthermore, the Commission stated that "the wholesale distribution service schedule requires that all rates and charges for wholesale distribution service be filed with the Commission, together with the appropriate cost support. Thus, we believe that there will be no opportunity for double recovery of facilities costs."¹⁰

10. Detroit Edison filed a request for rehearing, or in the alternative, for clarification of the April 16 Order. Detroit Edison's request was based on its assertion that the Commission should have required the ISO Tariff to specify that wholesale distribution service is limited to wholesale customers and not available to retail customers.

11. The Commission denied Detroit Edison's request for rehearing and explained that it has jurisdiction over unbundled retail transmission transactions. The Commission went on to say that where the tariff in question governs the use of local distribution facilities that exclusively provide service to unbundled retail customers, the Commission does not have jurisdiction.¹¹

⁸ April 16 Order at 61,364.

⁹ Id.

¹⁰ Id.

¹¹ See Midwest Independent Transmission Service Operator, Inc., 97 FERC ¶ 61,178 at 61,827 (2001) (November 9 Order).

Court of Appeals Decision

12. The Court found that the Commission exceeded its statutory authority in accepting a tariff filing that allows unbundled retail customers to take local distribution service under a Commission tariff. The Court emphasized that “[w]hen a local distribution facility is used to deliver[] energy to an unbundled retail customer, FERC lacks any statutory authority, and the state has jurisdiction over that transaction.”¹² By contrast, it explained, “when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA § 201(b)(1).”¹³ It found that the Midwest ISO OATT’s definition of “Wholesale Distribution Service” was defined “in such a way as to possibly cover retail distribution service as well as wholesale distribution service.”¹⁴ Thus, the Court concluded that the Commission exceeded its statutory jurisdiction under section 201(b)(1) of the Federal Power Act and vacated the orders under review.

Commission Determination

13. After further consideration and in light of the Court’s decision, we will grant Detroit Edison’s rehearing request and direct Midwest ISO to revise the definition of “Eligible Customer” in its OATT to clarify that unbundled retail customers that seek to take local distribution service cannot be eligible customers under the Midwest ISO OATT with respect to that service. As the Court points out, and as the Commission recognized in Order No. 888, “states have jurisdiction over local distribution ‘service’ –i.e., the service of delivering electricity to end users—even ‘where there are no identifiable local distribution facilities.’”¹⁵ Accordingly, we will direct Midwest ISO to submit a compliance filing that is consistent with this order and the Court’s decision within 30 days of the date of issuance of this order.

14. We emphasize that the jurisdictional issue discussed herein was the only issue appealed to or addressed by the Court. As a result, we reaffirm our decision on all of the other issues decided in the April 16 Order and our decision on those issues remains in effect.

¹² See Detroit Edison v. FERC, slip op. at 4-5 (quoting section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b)(1) (2000)).

¹³ Id.

¹⁴ Id. at 6.

¹⁵ Id. at 5 (citing Order No. 888 at 31,783).

The Commission orders:

(A) Detroit Edison's request for rehearing is hereby granted, as discussed in the body of this order.

(B) Midwest ISO is hereby ordered to revise its tariff and to make a compliance filing with the Commission within thirty days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.